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No. 96-272

In the Supreme Court of the United States

OCTOBER TERM, 1996

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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19 pp

QUESTION PRESENTED

Under the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act), 33 U.S.C. 901 *et seq.*, a worker engaged in maritime employment is entitled to compensation for a disability or death resulting from an injury occurring upon the navigable waters of the United States or adjoining area. Section 22 of the LHWCA, 33 U.S.C. 922, authorizes any party to seek modification of a disability award "at any time prior to one year after the date of the last payment of compensation, * * * or at any time prior to one year after the rejection of a claim." The question presented is whether a disability award may be modified to provide for a continuing award of nominal benefits to a claimant who has suffered a permanent partial injury but who has no present loss of wage-earning capacity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-16a) is reported at 81 F.3d 840. The opinion of this Court on a prior occasion is reported at 115 S. Ct. 2144. The earlier opinion of the court of appeals (Pet. App. 17a-20a) is reported at 28 F.3d 86. The decisions and orders of the Benefits Review Board (Pet. App. 21a-25a) and the administrative law judge (Pet. App. 26a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1996. A petition for rehearing was denied on May 22, 1996. Pet. App. 1a. The petition for a writ of certiorari was filed on August 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(h) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act) provides as follows:

> The wage-earning capacity of an injured employee in cases of partial disability under subsection (c)(21) of this section or under subsection (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. 908(h).

Section 22 of the Longshore Act provides in relevant part as follows:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. 922.

2. In 1980, Respondent John Rambo injured his back and leg while working as a longshore "frontman" for petitioner Metropolitan Stevedore Company (Metropolitan). See *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2146 (1995) (*Rambo I*). Rambo filed a disability claim with the Department of Labor under the Longshore Act.[1] The Longshore Act de-

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[1] Administration of the LHWCA is entrusted to the Secretary of Labor, see 33 U.S.C. 939(a), and that task has been assigned by regulation to the Office of Workers' Compensation Programs (OWCP), see 20 C.F.R. 701.202(a) (1996). The OWCP investigates claims, and, in uncontested cases, an OWCP district director (formerly called a deputy commissioner, see 20 C.F.R. 702.105) may issue awards. 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.315(a). In contested cases, parties may obtain a hearing before an administrative law judge (ALJ), who then issues a decision awarding or denying benefits. 33 U.S.C.

fines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10).

In 1983, an administrative law judge (ALJ) accepted a stipulation between Rambo and Metropolitan that Rambo had sustained a 22 1/2% permanent partial disability that had produced a weekly wage loss of $120.24 per week, or 22 1/2% of his average weekly wages of $534.38. *Rambo I*, 115 S. Ct. at 2146. Under Section 8(c)(21) of the Longshore Act, Rambo therefore received an award of $80.16 per week, which represented 66 2/3% of "the difference between the [claimant's] average weekly wages [prior to his injury] and [his] wage-earning capacity thereafter in the same employment or otherwise." 33 U.S.C. 908(c)(21). See *Rambo I*, 115 S. Ct. at 2146. Pursuant to Section 8(f) of the LHWCA, 33 U.S.C. 908(f), the ALJ also limited Metropolitan's liability for permanent disability compensation to 104 weeks, after which the Special Fund, which the Director of OWCP administers, became liable for the $80.16 weekly payments. *Rambo I*, 115 S. Ct. at 2146; see 33 U.S.C. 944(i)(2).[2]

919(d); 20 C.F.R. 702.316, 702.331-702.351. An ALJ decision is reviewable by the Department's Benefits Review Board, and Board decisions are reviewable in the courts of appeals. 33 U.S.C. 921(a)-(c). Modification of compensation awards is governed by 33 U.S.C. 922 and 20 C.F.R. 702.373.

[2] Although the Special Fund assumed liability for Rambo's compensation after the first 104 weeks under the award, Metropolitan retains a financial interest in the outcome of this case. Under the Longshore Act, an employer's required contribution to the Special Fund depends in part on the amount of payments made by the Fund during the preceding calendar year that are attributable to the employer. 33 U.S.C. 944(c)(2)(B). In recognition of their continuing financial interest, employers "are given the authority to monitor their claims in the special fund," 20 C.F.R. 702.148(b), and are among the "part[ies] in interest" who are permitted to seek modification of an award. 33 U.S.C. 922; see 20 C.F.R. 702.148(b) (employer "can initiate [a] proceeding to modify an award of compensation after the special fund has assumed the liability to pay benefits").

2. After receiving that award, Rambo attended crane school and obtained longshore work as a crane operator. *Rambo I*, 115 S. Ct. at 2146. He worked steadily in that position, see Pet. App. 29a, and also worked as a heavy lift truck operator in his spare time. *Rambo I*, 115 S. Ct. at 2146. Between 1985 and 1990, his average weekly earnings ranged from $1,307.81 to $1,690.50, or more than three times his pre-injury earnings, although his physical condition remained unchanged. *Ibid.*

In 1989, Metropolitan sought modification of the award pursuant to Section 22 of the LHWCA, 33 U.S.C. 922, arguing that Rambo's increased earnings represented a "change in conditions" such that he is no longer "disabled" under the Act. *Rambo I*, 115 S. Ct. at 2146. In 1991, a second ALJ agreed with Metropolitan and ended Rambo's disability payments. Pet. App. 26a-32a. The ALJ reasoned that modification may be based on a post-award change in a claimant's economic condition, *id.* at 28a-29a, and determined that Rambo in fact no longer had a loss of wage-earning capacity, *id.* at 29a-31a. In particular, the ALJ found that Rambo's increased wages were not attributable solely to the effects of inflation and salary increases; that his present employer had given no indication of an intent to lay off workers; that

Rambo was at no greater risk of losing his present job or in seeking new employment than anyone else; and that his present employment was not the result of a "beneficent" employer. *Id.* at 30a-31a.

The Benefits Review Board affirmed. Pet. App. 21a-25a. The Board rejected Rambo's argument that modification could not be granted absent a showing of a change in the claimant's physical condition. *Id.* at 24a-25a. The Board also noted that Rambo "has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on [Rambo's] increase in wage-earning capacity after the original award of benefits." *Id.* at 25a.

3. The court of appeals reversed. Pet. App. 17a-20a. The court concluded that "only a change in a claimant's *physical* condition can justify an award modification." *Id.* at 18a. In the view of the court of appeals, "[a] change in a claimant's wages, training, skills, or educational background is insufficient" to support modification of an award. *Id.* at 18a-19a.

4. This Court reversed and remanded, holding that an award modification may be based on an increase in the employee's wage-earning capacity owing to the acquisition of new skills, even without any change in his physical condition. *Rambo I*, 115 S. Ct. at 2147-2148, 2150. The Court explained that the Act's fundamental purpose is to compensate employees for wage-earning capacity lost because of injury; where that capacity has been reduced, restored or improved, the basis for compensation changes and the Act permits modification. *Id.* at 2148. The Court remanded the case to the court of appeals for consideration of other issues that had not been addressed on the initial appeal. *Id.* at 2150.

5. On remand, the court of appeals reversed the Benefits Review Board's order affirming the termination of Rambo's benefits and remanded for entry of a continuing nominal award. Pet. App. 2a-16a. The court observed that under Section 22 of the LHWCA, 33 U.S.C. 922,

> a compensation case may be reviewed and a new compensation order issued, which terminates, continues, reinstates, increases or decreases an award, at any time prior to one year after the date of last payment of compensation or rejection of the claim. Thus, an initial finding of no economic disability may be modified only within one year of such finding, but a weekly de minimus [*sic*] award, in effect, extends a claimant's right to modification indefinitely.

Pet. App. 11a. Because a continuing nominal award "is the only mechanism available to incorporate the possible future effects of a disability in an award determination," the court concluded, it is "an appropriate mechanism" for effectuating the statute's "'forward looking' perspective in considering whether a claimant has suffered a decline in wage-earning capacity." *Id.* at 13a.

The court of appeals also determined that the ALJ's decision to terminate Rambo's benefits was not supported by substantial evidence, and that the Board had erred in affirming the ALJ's order. Pet. App. 13a. The court found that the ALJ had overemphasized Rambo's current status and had failed to consider the effect of his permanent partial disability on his future earnings. *Ibid.* Because there remained a significant possibility that Rambo would eventually suffer economic harm as a result of his injury, the court con-

cluded, a continuing nominal award was the appropriate modification. *Id.* at 14a.

ARGUMENT

As the court of appeals recognized, the Longshore Act authorizes a continuing nominal award when a claimant's actual earnings do not fairly and reasonably reflect his long-term wage-earning capacity and there is substantial evidence that his injury will likely result in a future loss of earnings. The court's construction of the relevant LHWCA provisions does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Under the Longshore Act, an employee engaged in maritime employment who is injured while working upon the navigable waters of the United States or adjoining maritime area is entitled to compensation "in respect of disability or death." 33 U.S.C. 903(a). The Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10).[3] Thus, the

[3] For purposes of compensation, the Longshore Act classifies disability as either permanent total, temporary total, temporary partial or permanent partial disability. See 33 U.S.C. 908(a)-(c). For certain specified injuries resulting in permanent partial disability, incapacity to earn wages is conclusively presumed, and the claimant is entitled to compensation at the rate of 66 2/3% of the claimant's actual wage for a fixed number of weeks, according to a statutory schedule. 33 U.S.C. 908(c)(1)-(20) and (22). For "all other cases" of non-scheduled injuries involving permanent partial disability, "the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability." 33 U.S.C. 908(c)(21); see *Rambo I*, 115 S. Ct. at 2148.

Longshore Act "does not compensate physical injury alone but the disability produced by that injury. Disability under the LHWCA, defined in terms of wage-earning capacity, is in essence an economic, not a medical concept." *Rambo I*, 115 S. Ct. at 2148 (citations omitted). The Act recognizes, however, that actual post-injury wages are not always a suitable measure of wage-earning capacity. Thus, for purposes of setting compensation for disability, the measure of the wage-earning capacity of a partially disabled employee is "his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." 33 U.S.C. 908(h).

Section 8(h) further provides that, "in the interest of justice," such an employee's wage-earning capacity shall be fixed with "due regard to * * * any * * * factors or circumstances * * * which may affect his capacity to earn wages * * * including the effect of his disability *as it may naturally extend into the future.*" *Ibid.* (emphasis added).[4] The Longshore Act also recognizes that the wage-earning capacity of a disabled employee may change over time. Section 22 authorizes a district director or ALJ, "[u]pon his own initiative, or upon the application of any party in interest," to "terminate, continue, reinstate, increase, or decrease * * * compensation, or award compensation," on the grounds of either "a change in conditions" or "a mistake in a determination of fact."

[4] Other factors to be considered in setting compensation are "the nature of [the employee's] injury, the degree of physical impairment, [and] his usual employment." 33 U.S.C. 908(h).

33 U.S.C. 922. In *Rambo I*, this Court construed that provision to mean that "an award in a nonscheduled-injury case may be modified where there has been a change in wage-earning capacity * * * even without any change in the employee's physical condition." 115 S. Ct. at 2150.

2. The "forward-looking perspective" of the Longshore Act in setting compensation based on a claimant's wage-earning capacity is thus reflected in both Sections 8(h) and 22. See *Hole* v. *Miami Shipyards Corp.*, 640 F.2d 769, 772 (5th Cir. 1981); *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C. Cir. 1984); accord Pet. App. 12a-13a. Both provisions further the Act's design "to compensate claimants for reductions in wage-earning capacity, resulting from the injury, as they may occur throughout the claimant's lifetime." *Randall*, 725 F.2d at 795. Section 22's statute of limitations restricts the authority of the district director or ALJ, however, by providing that modification must be sought within one year of the last payment of compensation or the rejection of a claim. Thus, "[a]n initial finding of no economic disability * * * may only be modified within one year of such finding, even though subsequent events make it apparent that the claimant has suffered severe economic harm." *Hole*, 640 F.2d at 772. On the other hand, "if an initial determination is made that a claimant has suffered some degree of economic harm, however slight, and circumstances later develop indicating that the claimant was harmed to a greater or lesser degree than was originally apparent, the compensation award may be modified years later to reflect this greater or lesser economic injury." *Ibid.*

Consequently, the practice has developed of granting nominal awards in order to prevent Section 22's

statute of limitations from foreclosing the possibility of a subsequent modification. Such nominal awards are premised on the authority of a district director or ALJ to consider, "in the interest of justice, * * * the effect of disability as it may naturally extend into the future" in determining the injured employee's wage-earning capacity. 33 U.S.C. 908(h). Nominal awards are appropriately given to injured workers who are likely to suffer a future loss of earnings as a result of their disability even though their present earnings have not declined. Since it is not always possible, at the time of a claim, to predict how much a worker's future earnings will decline as his condition deteriorates or his job prospects change, a "forward looking" finding of "some degree of economic harm, however slight," *Hole*, 640 F.2d at 772, warrants a continuing nominal award rather than outright denial of the claim (and the consequent triggering of the statute of limitations).

Petitioner's principal contention (see Pet. 7-12) is that entry of a nominal award contravenes the one-year limitations period established by Section 22.[5] That contention is incorrect. Section 22 provides

[5] The Benefits Review Board has sometimes expressed support for the same position. See *Mavar* v. *Matson Terminals, Inc.*, 21 Ben. Rev. Bd. Serv. (MB) 336, 338 (1988) (citations omitted). But see *Morin* v. *Bath Iron Works Corp.*, 28 Ben. Rev. Bd. Serv. (MB) 205, 211 (1994); *Murphy* v. *Pro-Football, Inc.*, 24 Ben. Rev. Bd. Serv. (MB) 187, 191-192 (1991); *Burkhardt* v. *Bethlehem Steel Corp.*, 23 Ben. Rev. Bd. Serv. (MB) 273, 277-278 (1990). Because the Benefits Review Board is an adjudicatory tribunal without administrative authority, its decisions receive no special deference from the courts. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992); *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980).

that no request for modification may be made more than one year after compensation has been terminated or denied. Section 22 does not address the question whether a claim should be granted or denied in the first instance. That determination is governed by Section 8(h), which makes clear that an initial award or subsequent modification may appropriately be based on the anticipated future economic effects of a claimant's injury. "While a nominal award does indefinitely extend the period for modification, it is the only mechanism available to incorporate the possible future effects of a disability in an award determination." Pet. App. 13a.[6] Thus, in appropriate circumstances a continuing nominal award serves the purposes of the Act as a whole without contravening the directive of Section 22.[7]

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[6] In addition to compensation, the Longshore Act requires the employer to furnish medical services and supplies "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. 907(a). A claim for medical services can be made at any time, is not dependent on a showing of loss of wage-earning capacity, and is not affected by Section 22's statute of limitations governing applications to modify compensation orders or the denial of such orders. See *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 991 F.2d 163, 166 (5th Cir. 1993); *Strachan Shipping Co.* v. *Hollis*, 460 F.2d 1108, 1116 (5th Cir.), cert. denied, 409 U.S. 887 (1972).

[7] Petitioner misconstrues the statutory scheme (see Pet. 7-10) by failing to acknowledge that Congress enacted Section 8(h), with its provision for consideration of the anticipated future economic effects of maritime injuries, in order to mitigate the potential harsh effect of Section 22's one-year statute of limitations. See H.R. Rep. No. 1945, 75th Cong., 3d Sess. 6 (1938); S. Rep. No. 1988, 75th Cong., 3d Sess. 6 (1938). Petitioner also misconstrues Congress's intent in subsequently rejecting the proposed elimination of both the provision for consideration of the future economic effects of disability in Section

3. The courts of appeals that have addressed the question have uniformly construed Section 8(h) as authorizing a continuing nominal award under appropriate circumstances. See *Hole*, 640 F.2d at 772-773 (nominal award is appropriate when there is a significant possibility that the claimant will at some future time suffer economic harm as a result of his injury, but the precise degree of harm cannot be determined at the time of the claim); *Randall*, 725 F.2d at 800 (nominal award is appropriate "[w]hen it is clear that a claimant has suffered a medical disability and there is a significant possibility that the claimant will at some future time suffer economic harm as a result of his injury, but present circumstances make the extent of the economic injury unknowable"); *LaFaille* v. *Benefits Review Bd.*, 884 F.2d 54, 62 (2d Cir. 1989) (nominal award appropriate when there is substantial evidence that the claimant is likely to suffer a future loss of earnings as a result of his injury); Pet. App.

8(h) and the one-year limitations period in Section 22. In proposing those changes, the Senate committee noted the prevailing practice under which ALJs awarded "benefits for wage loss at the rate of 1 percent in cases where rejection of the claim would have required a request for modification within a year, whether or not such a new claim was justified." S. Rep. No. 81, 98th Cong., 1st Sess. 38 (1983). The committee stated that under the proposed statutory amendments, "[r]equests for modification will no longer be necessary simply to keep the statute of limitations from running." *Ibid.* Petitioner is incorrect in contending (Pet. 10) that Congress's retention of the one-year statute of limitations manifested an intent to bar nominal awards. To the contrary, Congress's decision not to amend the Act, despite its awareness of the ALJs' practice of making continuing nominal awards "simply to keep the statute of limitations from running," strongly suggests that Congress did not object to those awards.

14a (nominal award appropriate when there is a significant possibility that the claimant will at some future time suffer economic harm as a result of his injury). Thus, the court of appeals' decision in this case is fully consistent with the law in other circuits.

Contrary to petitioner's contention (Pet. 12), the decision of the court of appeals does not conflict with the decision of the Fourth Circuit in *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (1985). The court in *Fleetwood* acknowledged that the entry of a nominal award to facilitate subsequent modification "may be appropriate in some cases." *Id.* at 1234 n.9. The court explained that "[t]he basis for such an award is found in Section 908(h) of the LHWCA, which provides that an ALJ shall 'fix such wage-earning capacity as shall be reasonable, . . . including the effect of disability as it may naturally extend into the future.'" *Ibid.* (quoting 33 U.S.C. 908(h)). The court concluded, however, that "the need for a [nominal] award to protect a worker whose economic loss cannot be ascertained is not present in this case" because the claimant had "failed to present sufficient evidence for the ALJ to conclude that the degree of future economic harm is uncertain." 776 F.2d at 1234 n.9. Thus, the Fourth Circuit's refusal to order a nominal award in *Fleetwood* was based on its assessment of the facts before it, not on a legal conclusion that such an award would contravene the Act.

Contrary to petitioner's contention (Pet. 7, 14-15 n.3), the court below did not hold that the mere possibility of future economic harm is sufficient to continue nominal compensation for an employee who previously experienced a permanent partial disability. Rather, the court based its award on the uncontro-

verted facts (see Pet. App. 27a, 29a-31a) that Rambo's injury had reduced his ability to do his previous work; that his physical condition had remained unchanged since his accident; and that he did not know how long his higher-paying post-injury job would last. *Id.* at 13a. The court concluded that the ALJ's decision to terminate benefits was not supported by substantial evidence. Although the correctness of that conclusion is open to question, the court of appeals accurately stated the governing standard, and its application of that standard to the facts before it does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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